the more bonded the child is with the caregiver. *Id.* at p 29:23–25. The EPCDHS attempts to limit moves or removals because each move and removal is traumatic for a child. *Id.* at pp 29–30. If children are very bonded with their current caregiver, placement back home with a parent could be just as traumatic as the initial removal from their home. *Id.* at p 30:1–4. The social worker testified that EPCDHS is looking out for what is best for the children, not what is best for the parent. *Id.* at p 30:5–8.

ISSUE

Respondent argues that her move from prison to community corrections constitutes a change in the primary condition that prevented her from being able to parent her children. Mot. for Relief from J. Pursuant to C.R.C.P. 60, 2, Apr. 25, 2022. She argues that she is now able to continue her treatment and begin having substantial visitation with her children as she works towards being released from community corrections and into nonresidential status. *Id.* This Court disagrees.

ANALYSIS

Many courts, such as the United States Supreme Court, have granted relief under C.R.C.P. 60(b)(5)'s counterpart F.R.C.P. 60(b)(6). For example, the *Klapprott* Court granted Klapprott relief from judgment because the government did not offer evidence for the charges that resulted in Klapprott's four-and-a-half-year incarceration. *Klapprott*, 335 U.S. at 610. In the instant case, Respondent has failed to prove she served time for crimes she did not commit. Klapprott's allegations created an extraordinary situation that cannot fairly or logically be classified as mere 'neglect' on his part. *Id.* at 613. This is dramatically different from Respondent's neglect to comply with the EPCDHS treatment plan for nearly two years before her incarceration. TR 2/7/2022, 63:20–22.

Respondent argues that moving to Community Corrections from the Department of Corrections constitutes an extraordinary change in the primary condition which prevented her from being able to parent her children. Mot. for Relief from J. Pursuant to C.R.C.P. 60, 2, Apr. 25, 2022. In the *Klapprott* case, Klapprott was in jail, weakened from illness, without a lawyer in the denaturalization proceedings or funds to hire one, distressed and fully occupied in efforts to protect himself against the criminal charges. *Klapprott*, 335 U.S. at 605. Respondent's case is substantially different as she was a free person who failed to use the resources EPCDHS provided her. TR 2/7/2022, p 79:7–9. Additionally, she found herself in Community Corrections and later the Colorado Department of Corrections. *Id*. Most importantly, Respondent's circumstances have not changed in an extraordinary way because she was only allowed visitations at the Department of Corrections. *Id.* at pp 62–63. Moreover, as a resident of Community Corrections, she is only allowed visitations. *Id.* at

Free, calculated, and deliberate choices are not excusable reasons a court grants relief of a judgment. *Ackermann*, 340 U.S. at 198. Just as Ackermann failed to appeal a judgment, Respondent failed to act upon the treatment plan that EPCDHS created for her before her incarceration. *See* TR 2/7/2022, p 26:18–20 (explaining that Respondent has not satisfied the treatment plan requirements). The *Ackermann* Court held that there must be an end to litigation, and deliberate choices are not to be relieved from judgment. *Ackermann*, 340 U.S. at 198. Likewise, there must be an end to litigation in Respondent's case. Respondent's children were removed from their home in June 2019. TR 2/7/2022, p 58:2–6. It is in the children's best interest to remain with their foster-adopt family, where they have been since 2019. *See* Written Status Report (July 7, 2020), June 24, 2020.

Contributory fault, where one has failed to use care to protect his interests, is one ground of refusal to grant relief. *Carrethers*, 264 F. Supp. at 173. Similar to Carrethers, Respondent failed to use care to protect her parental interest by failing to act upon her treatment plan and

committing crimes that led to her incarceration at the Department of Corrections. TR 2/7/2022, p 79:7–9. It was no one's fault but Respondent's for getting into a fight at Community Corrections which resulted in her incarceration at the Department of Corrections. *Id.* at p 77:22–25. Respondent is responsible for her circumstances and did not use care to protect her interests; therefore, in the interest of the children's welfare and the interest of justice, this Court finds that a refusal to grant relief is appropriate.

"Gross conduct" of jurors constitutes an "other reason" justifying relief under clause (5) of C.R.C.P. 60(b). *Canton Oil Corp.*, 731 P.2d at 689. Respondent's case does not involve "gross conduct" of jurors; however, Respondent accuses the government for her failure to meet the sixth objective of her treatment plan. The sixth objective was for Respondent to have consistent visitation with her children. This Court does not find any "gross conduct" by government agencies. The Court notes that Respondent's opportunity to attend one visitation with her children while at the Department of Corrections could partly be blamed on the Department of Corrections' handling of COVID. TR 2/7/2022, p 78:17–23.

Additionally, a small part of the blame could be on the social worker. *Id.* However, this Court stated that it is incorrect for Respondent to say that it is not her fault that she had not seen her children in over a year. *Id.* Most of the blame belongs to Respondent, who was sent to the Department of Corrections. *Id.* Respondent completed almost none of her treatment plan for two years, and Respondent is to blame for her incarceration at the Department of Corrections. TR 2/7/2022, p 79:20–24.

The Colorado Supreme Court has held that Rule 60 is not a substitute for appeal and is meant to provide relief in the interests of justice in extraordinary circumstances. *Cavanaugh*, 644 P.2d at 5. Cavanaugh failed to file a motion for a new trial within fifteen days of a final order but instead filed a motion for relief from judgment relating to the validity of the order almost a year later. *Id.* at 4. Just like Cavanaugh, Respondent made a deliberate choice to avoid the open doors

of justice when she failed to take any action to complete her treatment plan as a free and able-bodied person. TR 2/7/2022, p 79:20–24. This case would be completely different if Respondent had used the resources given to her to complete her treatment plan. *Id.* at p 20:18–20. Respondent has put herself in this position, and Rule 60's expansive language of "any other reason" should not be used to undercut the favored rule of finality of judgments.

CONCLUSION

This Court denies Respondent's motion for relief from judgment pursuant to Colorado Rules of Civil Procedure 60(b)(5).

Applicant Details

First Name	**Kameron**
Middle Initial	**J**
Last Name	**St Clare**
Citizenship Status	**U. S. Citizen**
Email Address	**kameron.st.clare@emory.edu**
Address	**Address** Street **1605 Church Street, Apt 7059** City **Decatur** State/Territory **Georgia** Zip **30033** Country **United States**
Contact Phone Number	**3522670391**

Applicant Education

BA/BS From	**Stetson University**
Date of BA/BS	**May 2011**
JD/LLB From	**Emory University School of Law** **https://law.emory.edu/index.html**
Date of JD/LLB	**May 12, 2024**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**Emory Corporate Governance and Accountability Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Jacobi, Tonja
tonja.jacobi@emory.edu
(773) 251-5455
Cavedon, Matthew
matthew.paul.cavedon@emory.edu
404-727-4768
Witte, John
john.witte@emory.edu

References

(1) Hon. Regina Cannon; United States Magistrate Judge, United States District Court for the Northern District of Georgia; regina_cannon@gand.uscourts.gov; (404) 215-1385.

(2) Matthew Cavedon, Esq.; Robert Pool Fellow in Law and Religion, The Center for the Study of Law and Religion at Emory University School of Law; matthew.paul.cavedon@emory.edu; (860) 538-9130; Recommendation Enclosed.

(3) Prof. Tonja Jacobi; Professor of Law and Sam Nunn Chair in Ethics and Professionalism, Emory University School of Law; tonja.jacobi@emory.edu; (773) 251-5455; Recommendation Enclosed.

(4) Prof. John Witte, Jr.; Robert W. Woodruff Professor of Law, McDonald Distinguished Professor, and CSLR Faculty Director, Emory University School of Law; john.witte@emory.edu; (404) 727-6980; Recommendation Enclosed.

(5) Ms. Eileen Rumfelt, Esq.; Member, Miller & Martin (and Adjunct Professor of Negotiations at Emory University School of Law); eileen.rumfelt@millermartin.com; (404) 962-6129.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

1605 Church Street, Apt. 7059
Decatur, GA 30033
Kameron.St.Clare@Emory.edu
(352) 267-0391

June 27, 2023

The Honorable Ignacio Torteya, III
Federal Building and United States Courthouse
600 East Harrison Street, Room 203
Brownsville, TX 78520

Dear Judge Torteya:

I am a rising third-year student at Emory University School of Law and writing to apply for a Term Clerkship with you beginning the summer of 2024. Upon graduation, I look forward to beginning and building my legal career in Dallas, near family and friends. For reasons both intellectual and professional I'm eager to gain a deeper understanding of the judicial process. A clerkship in your court is thus a perfect fit for me.

An enthusiastic negotiator who is no stranger to hard work, I tackle whatever task needs doing and enjoy using my extensive research and writing experience to advocate persuasively. But while I know that my passion is found in advocacy and trial law, I remain torn between the professional paths of criminal trial practice and commercial litigation. A clerkship in your court will provide me with the exposure I need to understand these two paths better and determine where my skills and passion align most, and how I can best put them to use in service of others as I begin my career in the law.

My pursuit of a clerkship with you is also driven by my desire to gain exposure to the Texas legal landscape, where I am determined to set down roots once I begin my legal career. Additionally, being a first-generation student, it has become obvious to me that while many things are taught in the classroom, there remains a gap. For students who, like me, who lack family ties to the legal field, finding quality mentorship from senior members of the legal profession is essential to navigating the early stages of a legal career. The opportunity of your mentorship would be of great value to me not only as I begin my career, but also as I progress in the field.

I hope to add value to your judicial chambers through my research and writing expertise, my passion for advocacy and relentless self-improvement, and my commitment to collegiality, excellence, and integrity. In addition to having an article published in Perspectives by the Emory Corporate Governance and Accountability Review, for which I am now the Executive Articles and Essays Editor, the Emory Law School Supreme Court Advocacy Program selected me as a researcher for its amicus brief in *Health & Hosp. Corp. v. Talevski* and as a writer for its brief for cert in *Hester v. Gentry*. Moreover, throughout my legal experience as an invited research assistant for two Emory Law School professors, a judicial intern to U.S. Magistrate Judge Regina Cannon, and a Summer Law Fellow with The Fund for American Studies, I've continued to develop my research and writing skills, and I am always eager to learn more.

Enclosed are my resume, transcript, writing samples, and letters of recommendation. Thank you for considering my application. I look forward to hearing from you and the possibility of an interview.

Very truly yours,

Kameron St Clare

Enclosures

KAMERON ST CLARE

1605 Church Street, Apt. 7059, Decatur, GA 30033
kameron.st.clare@emory.edu | (352) 267-0391

EDUCATION

Emory University School of Law — **Atlanta, GA**
J.D. Candidate — May 2024

- GPA: 3.332
- Honors: Dean's List; Dean's Award, Negotiations (received highest grade in class); Merit Scholarship
- Journal: *Executive Articles and Essays Editor*, Emory Corporate Governance and Accountability Review (ECGAR), Vol. 11; "Activism by Any Other Name," published in ECGAR's *Perspectives* (2023)
- Activities: *(Founding) Vice President*, Free Speech Forum; OUTLaw; LALSA; CLS; Litigation Society *Vice President for Marketing*, Federalist Society; *Conduct Court Justice*, Student Bar Association; *Treasurer*, Emory Law School Supreme Court Advocacy Program (ELSSCAP)

University of Oxford — **Oxford, United Kingdom**
M.Phil. in Politics — October 2016

- Activities: *President*, Graduate Student Body; *Finance Committee Member*, Oxford Union Debating Society

The University of Sheffield — **Sheffield, United Kingdom**
M.A., awarded with distinction, in Political Theory — November 2012

Stetson University — **DeLand, FL**
B.A. in Political Science and Philosophy — May 2011

- Honors: Dean's List; T.C. Lane Award / Memorial Scholarship; William Armory Underhill Scholarship

EXPERIENCE

Superior Courts of Georgia, Atlanta Judicial Circuit — **Atlanta, GA**
Judicial Intern to Honorable Kimberly M. Esmond Adams — August 2023 – November 2023

The Fund for American Studies — **Washington, DC**
Summer Law Fellow — May 2023 – July 2023

United States District Court for the Northern District of Georgia — **Atlanta, GA**
Judicial Intern to U.S. Magistrate Judge, Regina Cannon — May 2023 – August 2023

Center for the Study of Law and Religion (CSLR) at Emory Law — **Atlanta, GA**
Research Assistant to Profs. John Witte, Jr. & Matthew Cavedon — May 2023 – August 2023

- Researching 19th Century treatises on state powers; developing research strategies for the Stono Rebellion and Black freedom in Spanish Florida

Research Assistant to Prof. Matthew Cavedon — December 2022 – February 2023

- Researched 13th-17th century Catholic legal theory related to the development of property law and indigenous rights

Research Assistant to Prof. John Witte, Jr. — May 2022 – September 2022

- Researched the role of Calvinism in the development of LGBTQ+ rights in the Anglo-American legal tradition
- One of only two law students in 2022 invited by Prof. Witte to be his Research Assistants with the CSLR

Gideon Law Group — **Atlanta, GA**
Research Assistant to Mark Goldfeder, Partner — January 2023 – Present

- Researching First Amendment associational rights, religious freedom, and antisemitism

Village Medical Injury Care (VMIC) — **The Villages, FL**
Director of Business Development — September 2018 – February 2020

- Recruited new business partners; built customer, community relationships for multi-specialty healthcare provider
- Planned marketing strategies, and negotiated media and other contracts on behalf of VMIC

ADDITIONAL INFORMATION

Professional Affiliations: Cooper Inn of Court. Atlanta Bar Ass'n. Dallas Bar Ass'n. Dallas LGBT Bar Ass'n. DAYL.
Interests: Enjoy baking, road trips, traveling, hiking, kayaking, equestrian, NHL, NFL, and volunteering/philanthropy.

Tonja Jacobi
Professor and Sam Nunn Chair
in Legal Ethics & Professionalism

July 5, 2023

The Honorable Ignacio Torteya, III
Federal Building and United States Courthouse
600 East Harrison Street, Room 203
Brownsville, TX 78520

Re: Kameron St Clare

Dear Judge Torteya:

I write to you to enthusiastically recommend Kameron St Clare to you for the position of judicial clerk. Kameron (or Kam) is a bright, engaged student whom I have greatly enjoyed having in both of my classes in the year since I have been at Emory Law.

You will receive applications from law students with higher GPAs, I am sure, but I doubt that you will receive an application from anyone as dedicated to his causes and as interested in ideas, debate, and politics, as Kameron. A brief survey of his extracurricular activities reveals that, while at Emory law, Kameron has been a leader in multiple fields. His activities include: *Executive Articles and Essays Editor*; ECGAR; (founding) *Vice President*, Emory Free Speech Forum; *Vice President for Marketing*, The Federalist Society; *Treasurer*, Emory Law School Supreme Court Advocacy Program (ELSSCAP) (including researching an amicus brief in *Health & Hosp. Corp. v. Talevski* and co-authoring the brief for cert in *Hester v. Gentry* on behalf of the Cato Institute); *Conduct Court Justice*, Student Bar Association OUTLaw; Christian Legal Society (CLS); and the Litigation Society. This is in addition to being a research assistant for three different law professors.

The story of how he came to cofound the free-speech forum offers a particularly valuable insight into his beliefs and principles, and how he conducts himself in promoting and protecting those values. Kameron cofounded the organization when a controversy arose at the school involving a Professor's use of certain words in the classroom. Kameron and a handful of other students came to the defense of the professor and started the organization, and since then he has worked hard to protect free speech on campus and elsewhere. Kameron is willing to put in the time and effort to the philosophical and political freedoms that he believes in, and face the wrath of those who may disagree.

It was this willingness to stand up for ideas that brought Kameron to my attention in constitutional criminal procedure. The selection bias of who takes this class—other than those taking it just to prepare for the bar exam—means that there is a heavy tilt toward pro-defendant positions, regardless of many sometimes quite relevant factors, such as police safety and crime avoidance. Kameron and one other student in my 70+ class of students were always willing to challenge the status quo and the orthodoxy, and I was very grateful to these two students for providing a counterpoint to the assumptions that many more progressive students make.

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I was very pleased when he signed up for my seminar on Supreme Court oral argument and strategy. This class was less ideologically tilted and again Kameron still made important contributions, both representing conservative and libertarian positions, as well as more generally. He showed a deep and broad knowledge of politics—perhaps not surprising given his excellent educational background in political science and philosophy, as well as his experience working in Congress briefly, and as a journalist.

Kameron wants to be a litigator, either in commercial litigation or First Amendment and white-collar criminal defense. He has directed his legal studies toward that dual goal, taking a variety of subjects, from business associations, to negotiations, to criminal procedure, to federal courts, all of which will have prepared him well for work as a judicial clerk. His journal comment was on the intersection of corporate governance structures and criminal law, and he is the Executive Articles and Essays Editor for the Emory Corporate Governance and Accountability Review (ECGAR). Kameron tells me that he enjoys these topics because they marry quite broad, abstract principles with concrete, real-world applications, His participation in class buttresses that description, as he could join both practical and quite philosophical arguments together. I should note that he also has extensive research and writing experience, both at Oxford and Sheffield, as well as Emory Law.

Personally, Kameron is likable and professional. He has a calm demeanor, even when discussing highly controversial issues. I believe he would be a pleasure to work side-by-side with in the close proximity of a judge's chambers, and he is very open to mentorship.

Please feel free to contact me if you would like to discuss Kameron's application further.

Sincerely,

Prof. Matthew P. Cavedon
Robert Pool Fellow in Law and Religion & Senior Lecturer in Law
Emory University Center for the Study of Law and Religion
Office G314, 1301 Clifton Rd. NE, Atlanta, GA 30322

June 22, 2023

To Whom It May Concern:

I am a former clerk for a U.S. district court and a state supreme court. I write this letter to support Kameron St Clare's application for a clerkship in your chambers. I have known Kameron since I returned to Emory Law in an academic capacity about a year ago. I have seen his work ethic, personality, and research abilities, and I believe him to be qualified.

I have gotten to know Kameron in both professional and extracurricular capacities. He has been my research assistant over the past semester, he had a major writing role in an amicus brief I filed at the U.S. Supreme Court, and we have worked together through Emory's Federalist Society chapter. Kameron stands out as a ready joiner, excellent conversationalist, and thorough researcher.

Kameron is everywhere. A few months back, I spoke at a gathering of campus Federalist Society leadership. I knew that Kameron is a leader in OUTLaw and the Emory Law School Supreme Court Advocacy Program. But at the gathering, I learned that he is also an officer in the Federalist Society, an editor of Emory's *Corporate Governance and Accountability Review*, and a student bar justice. I have lost my sense of surprise at seeing him in new contexts—Kameron anchors much of campus life.

What's no surprise is why Kameron's peers like him so much: he's a joy to be around. We recently scheduled a twenty-minute work call. We ended up talking for nearly an hour about virtue theory, natural law, and politics. Kameron can carry on educated conversation about a wide range of topics.

Kameron's intellectual appetite serves him well as a research assistant, too. I spent a month trying to track down sixteenth-century Latin manuscripts. Campus research librarians and InterLibrary Loan couldn't help me, nor could several other experts in the field. I had Kameron take a shot at it. Within days, he had consulted the Library of Congress and found the manuscript on a website belonging to France's Bibliothèque Nationale.

I recommend Kameron for a clerkship, where passion is indispensable, confidantes are valuable, and hard questions frequently arise.

Please contact me if I can be of further assistance.

Sincerely,

Prof. Matthew P. Cavedon, JD/MTS
(404) 727-4768
mcavedo@emory.edu

EMORY
LAW

John Witte, Jr.
Robert W. Woodruff Professor of Law
McDonald Distinguished Professor
Faculty Director, Center for the Study of Law and Religion

July 7, 2023

The Honorable Ignacio Torteya, III
Federal Building and United States Courthouse
600 East Harrison Street, Room 203
Brownsville, TX 78520

Dear Judge Torteya:

I am pleased to write in support of Mr. Kameron St. Clare who is applying for a clerkship in your chambers upon his graduation from Emory Law School in May 2024.

Mr. St. Clare took my courses in Criminal Law in his 1L year and First Amendment: Religious Freedom in his 2L year. In both courses, he made excellent interventions throughout the semester, and I was impressed with his forensic ability, his diligence in class preparation, and his willingness to engage hard questions with clarity, conviction, and power. Particularly in the First Amendment course this past semester, he helped to drive several deep debates in class about issues of religious expression in public schools and public life, how to balance religious freedom and sexual liberty, what place for government funding and regulation in religious schools, and more. When pressed in Socratic discussions, especially in Criminal Law, Mr. St. Clare was able to see and argue eloquently different sides of an issue.

Because of his strong performance in Criminal Law, I hired him as my research assistant -- full time last summer, and part time since. He has shown strong research and writing skills, is able to distill his findings succinctly in crisp memos, asks good follow-up questions, and is timely in delivering his assignments. He has done this strong research work for me while attending his courses, serving as the Executive Articles and Essays Editor for the *Emory Corporate Governance and Accountability Review*, and interning with U.S. Magistrate Judge Regina Cannon and State Superior Court Judge Kimberly M. Esmond Adams. His background before law school, including graduate studies at Oxford and Sheffield, as well as his experience as a journalist, has prepared him well for his work in the legal profession.

Mr. St. Clare is an individual of exemplary character who looks you in the eye and tells you what he thinks, while being respectful and engaged. His unwavering commitment to free speech, which was displayed when he co-founded the Emory Free Speech Forum, speaks to his sense of integrity and courage to stand for his convictions. He has also demonstrated a collegial attitude and open-mindedness through his interactions with his peers and professors, embracing differing views while maintaining respectful discourse.

Mr. St. Clare will be an excellent judicial clerk, and will bring learning, native intelligence, good humor, disciplined work habits, and a gifted pen to the job. I am confident that he will be a valuable contributor to your chambers and will profit greatly from the experience.

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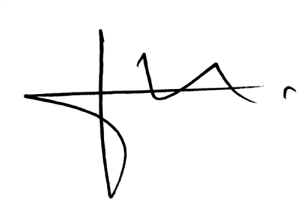
1301 Clifton Road NE
Atlanta, GA 30322-2270

amy.wheeler@emory.edu 404.727.5588

Thank you for considering Mr. St. Clare. Should you have any questions about him, please feel free to contact me.

Sincerely,



John Witte, Jr.

KAMERON ST CLARE

1605 Church Street, Apt. 7059, Decatur, GA 30033
kameron.st.clare@emory.edu | (352) 267-0391

WRITING SAMPLE 1

The following is a report and recommendation on a motion to dismiss that I wrote while working as a Judicial Intern for United States Magistrate Judge Regina D. Cannon.

WRITING SAMPLE DETAILS:

Written: July 2023

Editing Note: The report did *not* receive a line-edit. Earlier drafts were given minor feedback as to legal analysis and some stylistic notes specific to Judge Cannon's preferences.

Confidential Information: The report has been anonymized and information that could identify the parties has been removed.

Judge Cannon's Contact Information:
Email: Regina_Cannon@gand.uscourts.gov
Phone: (404) 215-1385

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NON-FINAL REPORT AND RECOMMENDATION

This is an employment discrimination case brought under the Family Medical Leave Act ("FMLA"). Plaintiff has sued his former employer, Defendant, alleging unlawful interference with FMLA leave and retaliation. Pending before the Court is Defendant's motion to dismiss, (Doc. 7). For the reasons below, the undersigned **RECOMMENDS** that the motion be **DENIED**.

I. BACKGROUND

The dispute concerns Defendant's alleged unlawful interference with and retaliation against Plaintiff's exercise of his FMLA rights. The material facts alleged in Plaintiff's complaint, (Doc. 1), show the following.[1]

A. Factual Background

Plaintiff was first employed by Defendant in March 2017 as a software systems architect, a position that allowed him to work remotely from his home. (Doc. 1 ¶ 9). His duties initially included "responsibility for [Defendant]'s company-wide portfolio of developer, project management and documentation tools" as well as overseeing the "alignment of [Defendant]'s […] platforms with its client's software," but by 2019 his responsibilities expanded and he became "one of the central members of the products design team." (*Id*. ¶ 10).

Plaintiff suffered his first traumatic brain injury ("TBI") as a result of being violently attacked when, in 2018, he was the victim of a home robbery. (*Id*. ¶ 11). In addition to Plaintiff's TBI, the attack caused him to experience "recurrent health issues, including chronic headaches, periodic lapses in concentration, and blurred vision." (*Id*.). Beyond the above physical health issues, he also experienced psychological effects from the attack requiring him to receive "therapy and psychiatric care for a diagnosis of post-traumatic stress disorder, severe depression, and anxiety." (*Id*.). The ongoing medical care and follow-up treatment for these conditions required him to attend doctor's appointments during work hours and to take "periodic time off." (*Id*.).

In May 2019, Supervisor became Plaintiff's direct supervisor. Sometime shortly after, Plaintiff disclosed the 2018 TBI to Supervisor both to explain the need for his "relatively frequent excused absences" and in order to apprise Supervisor about the "risk of sudden complications or a medical crisis" due to the TBI. (*Id*. ¶ 12). Supervisor responded by saying that he did not know why Plaintiff had disclosed information about the TBI. (*Id*. ¶ 13).[2]

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[1] When the Court reviews a motion to dismiss, it treats the factual allegations made in the complaint as true and construes them in the light most favorable to the plaintiff. *Rivell v. Priv. Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008).

[2] Plaintiff also alleges that following his medical disclosure "[Supervisor] started […] leav[ing Plaintiff] off intraoffice invites to departmental meetings" and that Supervisor "became

Over the weekend of September 7–8, 2019, Plaintiff was involved in a boating accident. (*Id*. ¶ 14). As a result of the accident, Plaintiff suffered a concussion, his second head injury in as many years. (*Id*.). Plaintiff texted Supervisor on the morning of September 9, 2019, informing him of the re-injury and the possibility that he might need to take time off to receive treatment. (*Id*.).

Two days later, on September 11, 2019, Supervisor informed Plaintiff of his placement on a performance improvement plan ("PIP"). (*Id*. ¶ 17). The PIP was initially scheduled to run from September 12 to October 11, 2019, and was his first "corrective action or performance write-up" as Defendant's employee. (*Id*.). The PIP required him to provide Supervisor with "weekly outputs and updates" and it set the first deadline for Friday, September 13, 2019. (*Id*. ¶ 18).

On September 16, 2019, Supervisor informed Defendant's Human Resources ("HR") department of Plaintiff's second brain injury, one full week after Plaintiff initially texted him about the accident. (*Id*. ¶ 16). According to Defendant's policies, when a supervisor learns that an employee is "experiencing a serious medical condition" the supervisor is required to inform Defendant's HR team "as soon as practicable" so that HR can give the employee prompt notice of his/her FMLA rights and responsibilities. (*Id*. ¶ 15).

On September 18, 2019, HR informed Plaintiff of his FMLA eligibility and acknowledged that Supervisor's one-week delay violated Defendant's FMLA notification policy. (*Id.*). At the time he was notified of his FMLA rights, Plaintiff did not consider taking FMLA leave because he believed doing so would violate the terms of his PIP and result in his termination. (*Id*. ¶ 19). Not until speaking with an agent in Defendant's employee assistance program on October 2, 2019, did he learn that Defendant's policy allowed an FLMA eligible employee to temporarily pause his PIP while taking leave under the FMLA. (*Id*. ¶ 20).

Plaintiff subsequently applied for and began FMLA leave on October 7, 2019, citing ongoing side effects from the second TBI, severe depression, and heightened anxiety. (*Id.*). During his 12-week leave under FMLA, Plaintiff's treating physician issued an updated diagnosis that included severe attention deficit hyperactivity disorder ("ADHD").[3] (*Id*. ¶ 21).

Upon Plaintiff's return to work around January 3, 2020, the PIP resumed immediately and was extended to January 10, 2020. (*Id*. ¶ 24). On the last day of the PIP, January 10, 2020, Plaintiff met virtually with Supervisor and HR, and was informed that he was being terminated because he had failed to satisfy the requirements of the PIP. (*Id.*). Plaintiff remained unemployed for roughly 14 months. (*Id*. ¶ 27).

The Complaint asserts claims for willful interference and willful retaliation under the

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increasingly unresponsive to emails […] even ones marked as time sensitive." (Doc. 1 ¶ 13). While the undersigned acknowledges that Plaintiff may intend for this to bolster his claims as to willfulness and Supervisor's state of mind, because this is alleged to have occurred shortly after Supervisor became Plaintiff's direct supervisor it is not clear what baseline of responsiveness Plaintiff used to compare against and measure the decline.

[3] The undersigned acknowledges that certain medical studies have concluded that some TBIs are linked either the onset of ADHD or that such TBIs may also produce the same symptoms experienced by patients with ADHD. (Doc. 1 ¶ 22).

FMLA. Plaintiff alleges that Defendant violated the FMLA by interfering with his protected right to FMLA leave when it failed to provide him with adequate or timely notice of his eligibility for leave and by discouraging him from exercising his right to FMLA leave when it placed him on the PIP. He also alleges that Defendant retaliated against him for exercising his right to take FMLA leave by terminating him.

B. Procedural Background

Plaintiff filed his complaint on September 8, 2022. (Doc. 1). Defendant originally moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) on October 18, 2022, arguing in part that Plaintiff's claims were time barred.[4] (Docs. 7, 17). The motion argues that because Plaintiff was discharged on January 10, 2020, and filed his complaint on September 8, 2022, the standard two-year FMLA statute of limitations renders the complaint untimely on its face. (Doc. 7). Defendant contends that the Court should consider a text message and PIP even though Plaintiff did not attach those documents to his complaint. (Docs. 7, 17). Consideration of those documents, the motion insists, reveals that Plaintiff has failed to plausibly plead the willfulness or retaliation necessary to trigger FMLA's three-year statute of limitations. (*Id.*). The motion is fully briefed and ripe for review.

II. LEGAL STANDARD

When reviewing a motion to dismiss, a court must determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The essential benchmark is one of *plausibility* rather than mere *possibility*. *Id.* ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."). The plausibility of a claim must be undergirded by facts, not whimsical inference. *Id.* (explaining that a complaint must include more than "an unadorned, the-defendant-unlawfully-harmed-me accusation"). That means "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* While a court is obligated to accept well-pleaded facts as true and make reasonable inferences in favor of the plaintiff, it is not required to accept the plaintiff's legal conclusions or unwarranted deductions of fact. *See Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F. App'x 1194, 1199 (11th Cir. 2012). Put simply, the plaintiff's allegations must sketch an actual (*i.e.*, factual)—not just hypothetical—claim. *Iqbal*, 556 U.S. at 678 ("[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" (citation omitted)).

Furthermore, the pleaded facts must themselves move beyond merely being consistent with an entitlement to relief—they must *reasonably suggest* as much. *Twombly*, 550 U.S. at 557 (emphasizing "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with)" the plaintiff's entitlement to relief). Fundamentally, the pleading standard requires the plaintiff to allege facts sufficient for a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. As relevant in the

[4] In its motion, Defendant mistakenly attached the incorrect document for Exhibit A. (Doc. 7). Defendant filed a corrected version of Exhibit A in its reply brief. (Doc. 17). Plaintiff was then allowed to file a sur-reply. (Doc. 18).

employment context, a plaintiff need not allege the same measure of facts necessary to make out a *prima facie* case, but he must nevertheless include sufficient factual allegations to plausibly suggest an adverse employment action took place due to an unlawful motive. *See Henderson v. City of Birmingham, Ala.*, 826 F. App'x 736, 740 (11th Cir. 2020).

III. DISCUSSION

After careful consideration, the undersigned finds that the Court may consider the extrinsic evidence offered by Defendant in its motion. However, because on a motion to dismiss the Court must assume the validity of Plaintiff's factual pleadings and draw all reasonable inferences in favor of the Plaintiff, consideration of the text message and PIP are insufficient to sustain the motion to dismiss. The following discussion is arranged in conceptual order, starting with the admissibility of the extrinsic evidence offered by Defendant.

A. Admissibility of Defendant's Extrinsic Evidence on its Motion to Dismiss

The undersigned finds that the text message and PIP[5] should be considered because they are referenced in the complaint and central to Plaintiff's claims, and because the authenticity of the content in these documents is undisputed.

Under the Eleventh Circuit's incorporation-by-reference doctrine, a reviewing court "may consider evidence attached to a motion to dismiss without converting the motion into one for summary judgment if (1) the plaintiff refers to certain documents in the complaint, (2) those documents are central to the plaintiff's claim, and (3) the documents' contents are undisputed." *Baker v. City of Madison, Ala.*, 67 F.4th 1268, 1276 (11th Cir. 2023) (internal quotations omitted) (citation omitted); *see Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) ("[I]f the document's contents are alleged in a complaint and no party questions those contents, we may consider such a document provided it meets the centrality requirement[.]"). Here, Plaintiff advances two claims. First, he alleges that Defendant willfully interfered with the exercise of his FMLA rights by failing to adequately inform him of his rights under the statute in a timely manner and by discouraging him from requesting leave. Second, he alleges that Defendant willfully retaliated against him for exercising his FMLA right to take leave when it terminated his employment.

The FMLA makes it unlawful for an employer to interfere with an employee's rights under the statute. 29 U.S.C. § 2615(a)(1); *Diamond v. Hospice of Fla. Keys, Inc.*, 677 F. App'x 586, 592 (11th Cir. 2017) (citing *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1206 (11th Cir. 2001)). Likewise, the FMLA also prohibits an employer from retaliating against an employee who exercises or attempts to exercise his statutorily protected rights. 29 U.S.C. § 2615(a)(2) (an employer may not "discharge or in any other manner discriminate against" an employee for engaging in FMLA-protected conduct); *Diamond*, 677 F. App'x at 592. In order to be subject to claims of interference or retaliation, an employer must first receive adequate notice

[5] Versions of the PIP are included in Defendant's Exhibits B, C, D, and E. (Docs. 7, 17). While each successive version includes new content as to Supervisor's updates on Plaintiff's progress under the PIP, the language relevant for this motion is identical in each of the different versions. For this reason, the undersigned refers to the "PIP" rather than specific exhibits containing one version or another.

that its employee may be entitled to FMLA benefits.[6] *White*, 789 F.3d at 1196. Thus, an employee's ability to establish that his employer had sufficient notice of his potential eligibility under the statute is central to every FMLA interference or retaliation claim. *See id.*

Additionally, standard FMLA interference and retaliation claims are subject to a two-year statute of limitations. 29 U.S.C. § 2617(c)(1). However, when an employee alleges his employer engaged in interference or retaliation under FMLA *willfully*, the statute provides for a three-year statute of limitations *Id.* § 2617(c)(2). "Willful" is not defined in the FMLA, and neither the Supreme Court nor the Eleventh Circuit have addressed the issue relative to the FMLA. *Smith v. St. Joseph's/Candler Health Sys.*, 770 F. App'x 523, 526 (11th Cir. 2019). That being said, the word is "considered synonymous with such words as 'voluntary,' 'deliberate,' and 'intentional'" and may generally indicate that an "'employer either knew or showed reckless disregard for […] whether its conduct was prohibited[.]'" *Id.* (citations omitted) (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).

i. Plaintiff's September 9, 2019 Text Message to Supervisor

The text message is referenced in Plaintiff's complaint. (Doc. 1 ¶ 14). In opposition to amended Exhibit A offered by Defendant, Plaintiff disputes the text message both on the grounds that it is not central to his claim and on the grounds that its authenticity has not been established because Defendant's attachment constitutes an incomplete record. (Doc. 11 at 9). Plaintiff argues that the text message and Supervisor's declaration are not central to his claims because "analysis of [Supervisor]'s actions turns equally on other factors: the impact of [Supervisor]'s knowledge of [Plaintiff]'s medical history, and [Supervisor]'s understanding of [Defendant]'s notice policies." (*Id.*). But the centrality of these other factors does not preclude the centrality of the text itself *as* notice. Without notice, questions as to Supervisor's understanding of Defendant's policies or knowledge about Plaintiff's medical history never arise. Because notice is what gives rise to these questions, the text is central to Plaintiff's claim to the extent it constitutes notice under the FMLA.

Plaintiff next argues that Exhibit A has not been authenticated as a business record under Fed. R. Evid. 803(6). (*Id.*). Importantly, because Defendant's incorrect attachment for Exhibit A in its initial motion claimed to show a transcript of numerous text messages between Plaintiff and Supervisor, the amended Exhibit A in its reply brief (which offers a more limited selection of the record) cannot be reasonably viewed as a complete record.

However, this Circuit's incorporation-by-reference doctrine allows for *prima facie* authentication under Fed. R. Evid. 901. *In re Int'l Mgmt. Assocs*., 781 F.3d 1262, 1267 (11th Cir. 2015) ("[T]o admit the underlying documents, the trustee would have needed to establish only a prima facie case that they are what he claims they are."). This authentication burden may be satisfied "with circumstantial evidence of the authenticity of the underlying documents through

[6] Under the FMLA, the employee's notice requirement differs depending on whether the qualifying leave is foreseeable or unforeseeable. 29 U.S.C. §§ 2601–2654; *see White v. Beltram Edge Tool Supply, Inc*., 789 F.3d 1188, 1196 (11th Cir. 2015) (holding that a notice requires different content depending on the foreseeability of an employee's need for leave). The parties appear to agree that Plaintiff's leave was unforeseeable, and thus, the undersigned considers only the unforeseeable notice standard.

the testimony of a witness knowledgeable about them." *Id.* (citation omitted); *see United States v. Caldwell*, 776 F.2d 989, 1001–02 (11th Cir. 1985) ("Authentication or identification under rule 901 merely involves the process of presenting sufficient evidence to make out a *prima facie* case that the proffered evidence is what it purports to be."); *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1313 (11th Cir. 2020) (holding that the authentication burden was met when supporting testimony was offered along with the evidence submission). Here, Defendant met its burden for authentication through Supervisor's declaration that he has first-hand knowledge of the text message in amended Exhibit A. (Exhibit 1).

Moreover, disputing the *completeness* of the record is not the same as disputing the *contents* of the record, and in this case, Plaintiff does not dispute the contents of the text message pictured in the amended Exhibit A. In other words, Plaintiff is not questioning *that* the text message exists as introduced in Exhibit A, rather he is questioning *what* the message means in context.

In light of these considerations, and because there is only one text in question, Plaintiff's argument that Exhibit A has not been authenticated as a business record under FRE 803(6) is insufficient to defeat its admission. Thus, the undersigned finds that consideration of the text message at this stage is appropriate.

ii. The PIP

The PIP is referenced by the complaint. (Doc. 1 ¶ 17). It is also central to the complaint because Plaintiff has alleged both that the implementation of the PIP interfered with the exercise of his FMLA rights by initially discouraging him from taking leave and because the PIP ultimately served as the basis for his discharge which he alleges constituted retaliation. Crucially, Plaintiff does not dispute the contents of the PIP. Thus, the PIP meets this Circuit's extrinsic evidence standard. *See Baker*, 67 F.4th at 1276. As such, the undersigned finds that consideration of the PIP at this stage is also appropriate.

B. Merits of Motion to Dismiss

Having decided to consider Defendant's extrinsic evidence, the undersigned now moves to the merits of its motion. Because this is a motion to dismiss and the Court is required to accept well-pleaded facts as true and make reasonable inferences in favor of the plaintiff, the analysis here need only concern questions of (1) whether the September 9, 2019 text message put Defendant on notice and (2) whether there is a plausible causal connection between the PIP and the alleged delay. The undersigned begins with the notice requirement before turning to the PIP's causal connection to Plaintiff's interference claim.

i. Plaintiff's Notice Requirement and Text to Supervisor

According to Defendant, Plaintiff's September 9, 2019 text message reading "[Defendant] here. I just got home from hospital, had an accident today and got concussion. Will be on tomm a bit late. Thx for understanding[,]" did not put Supervisor on notice that Plaintiff might be entitled to FMLA leave. (Doc. 7 at 9). Defendant contends that the text message was not notice because (1) being late to work is not an absence and leave was not requested, and (2) notification of a hospital discharge was insufficient to infer a potential need for FMLA. (Doc. 17 at 5–6).

An employee satisfies the FMLA notice requirement when he provides information such that his employer can reasonably understand a *potential* need for FMLA. *Ramji v. Hosp. Housekeeping Sys., LLC*, 992 F.3d 1233, 1243 (11th Cir. 2021) (holding that "notice must simply allow the employer to understand that the employee potentially qualifies for FMLA rights."). Moreover, an employee does *not* need to explicitly request FMLA leave. *White*, 789 F.3d at 1196 ("As a general rule, an employee need not explicitly mention the FMLA when giving notice to her employer."); *see also Cruz v. Publix Super Mkts., Inc.*, 428 F.3d 1379, 1383 (11th Cir. 2005) ("An employee is not required to assert expressly her right to take leave under the FMLA."). Rather the content of an employee's notice only needs to provide adequate information for *reasonable inference* by the employer that the employee may qualify. *White*, 789 F.3d at 1196.

Once on notice, the employer bears the burden of further inquiry to determine whether the employee "actually qualifies for FMLA protection." *Cruz*, 428 F.3d at 1383; *see also Strickland.*, 239 F.3d at 1209 ("If an employee tells his employer that he must leave work because he is suffering a debilitating diabetic attack, the employee has given notice of a need for unforeseeable leave sufficient to shift to the employer the burden of making further inquiry into whether the absence truly qualifies for FMLA protection."). Additionally, when the employer "acquires knowledge" allowing it to reasonably infer that the employee *may* qualify for FMLA, "'the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances.'" *Crawford v. City of Tampa*, 464 F. App'x 856, 857 (11th Cir. 2012) (citation omitted). An employer's failure to provide its employee with notice "may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights." *Id*.

Defendant's arguments that Plaintiff's September 9, 2019 text message did not constitute notice are unsuccessful for three reasons: (1) notice does not require Plaintiff to request an absence, (2) notice of hospitalization may be sufficient to put the employer on notice under FMLA depending on the context, and (3) eventually Defendant *did* infer that Plaintiff was potentially FMLA-eligible based on his text message to Supervisor.

Defendant begins by arguing that an employee's communication with his employer must include a request for an absence in order for it to constitute notice. (Doc. 17 at 6). To support its argument, Defendant quotes *Ramji*: "The critical question we must consider asks whether the 'employee adequately conveyed to the employer sufficient information to put the employer on notice that her absence was potentially FMLA-qualifying.'" (*Id.* (emphasis in brief)). However, the Court's use of "absence" in *Ramji* is not dispositive in the way Defendant suggests because the Court used "absence" as a proxy for the employee's potentially FMLA-qualifying condition.

Next, Defendant, relying on *Gay v. Gilman Paper Co.*, 125 F.3d 1432 (11th Cir. 1997), argues that, "simply notifying an employer of a brief hospital visit for an injury is insufficient notice of a potentially-FMLA qualifying condition." (Doc. 7 at 9). *Gay*, however, is distinguishable from the facts here for three reasons. First, the employee and her family in *Gay* actively concealed the seriousness of her medical condition from her employer. 125 F.3d at 1436. The Court there held that this deception on the part of the employee absolved her employer of his "burden to request more further information" because the employer could not be reasonably expected to conclude that the employee's medical condition may have qualified for FMLA. *Id.* Here, Plaintiff did not conceal the seriousness of his injury. Nevertheless, Supervisor did not

request further information.

Second, the type of hospital visit described in the purported notice in *Gay* is disanalogous to the hospitalization that Plaintiff described in his text. While the text to Supervisor informed him that Plaintiff had been hospitalized following an accident resulting in the re-injury of an ongoing condition, the employer in *Gay* was told merely that the employee was at the hospital to undergo tests. *Id.* Third, in contrast to the facts in *Gay*, not only was Plaintiff's condition ongoing such that he was already receiving accommodations following the 2018 TBI, but according to the complaint he previously disclosed his condition to Supervisor, complete with information about the risks and potential severity of flare ups. (Doc. 1 ¶ 12).

Finally, Defendant's arguments are undercut by the fact that Supervisor submitted the September 9, 2019 text to Defendant's HR when he eventually informed them of Plaintiff's injury on September 16, 2019. (Doc. 17 at 7 ("the text was forwarded to HR.")). Viewing these facts in the light most favorable to Plaintiff, this suggests that Supervisor *did* view the information in the text message as sufficient notice for him to *infer* that Plaintiff was potentially entitled to FMLA. As such, the undersigned finds that Plaintiff has plausibly pled sufficient facts to show he provided Defendant with notice as required under FMLA.

ii. FMLA Interference and the PIP

Defendant argues that Plaintiff cannot rely on the PIP to establish a causal connection to his initial decision not to seek FMLA leave. (Doc. 7 at 12). According to Defendant, this is because the language of the PIP is "standard," and standard language about the consequences of failure to meet a PIP cannot establish an attempt to mislead Plaintiff or interfere with his FMLA rights. (*Id.*). Defendant's contention is incorrect because it relies on a misreading of the relevant precedent.

To establish that an employer engaged in interference under FMLA, "an employee must demonstrate that he was denied a benefit to which he was entitled under the FMLA." *Martin v. Brevard Cnty. Pub. Sch.*, 543 F.3d 1261, 1266–67 (11th Cir. 2008) (citations omitted). A claim of interference under FMLA must satisfy three elements. First, the plaintiff must show that he was entitled to receive FMLA benefits. *White*, 789 F.3d at 1191. Second, he must show that the employer denied his FMLA rights. *Id.* Third, the plaintiff must "demonstrate harm, or prejudice, resulting from the employer's interference with [his] exercise (or attempted exercise) of an FMLA" right. *Ramji*, 992 F.3d at 1245.

Courts evaluate a claim of FMLA interference by a preponderance of the evidence. *Crawford*, 464 F. App'x at 858 (citation omitted). Notably, employer interference need not be overt or even intentional under the FMLA; rather, "unlawful employer interference includes not only refusing to authorize FMLA leave, but also 'discouraging an employee from using such leave.'" *Diamond*, 677 F. App'x at 592 (citing *Martin*, 543 F.3d at 1267).

Additionally, when considering standard language that is included in a PIP, the Court views that evidence in context. The Eleventh Circuit has held that while standard language *alone* may not be used to establish FMLA prejudice, such evidence *may contribute* toward establishing prejudice when considered *in context*. *Munoz v. Selig Enters.*, 981 F.3d 1265, 1280 (11th Cir. 2020).

To support its argument that the PIP could not have caused Plaintiff's delay in seeking FMLA leave, Defendant relies on *Munoz v. Selig Enters.*, where the Court held that the disciplinary language there "did not establish intent to interfere with FMLA leave." (Doc. 7 at 12–13). While Defendant is correct as to the holding relative to the particular language that the *Munoz* Court considered, Defendant's broader reliance on *Munoz* is misguided. *Munoz* is inapposite to the facts here. Rather than holding that standard language like that included in the PIP is dispositive on this question or that standard language *cannot* provide evidence of willfulness to violate FMLA, the *Munoz* Court contextualized the evidence. *Munoz*, 981 F.3d at 1280 ("This language *alone* does not establish that Selig intended to deny Ms. Munoz her right to FMLA leave. … *But Ms. Munoz has alleged more than that*." (emphasis added)). Therefore, while standard language *alone* may not be used to establish prejudice, it may contribute toward establishing prejudice when considered *in context*.

Here, the language in the PIP that Defendant points to reads as follows:

> [Plaintiff], in the event the below goals and performance objectives are not met within the timeframe and check-in points indicated in the Improvement Plan, your employment relationship with [Defendant] may be reevaluated, up to and including termination of employment. This Improvement Plan may be amended, extended, or abbreviated as warranted by your performance results.

(PIP; Doc. 7 at 12). Three factors are key. First, although most of the language to which Defendant points in its defense is "standard language," the section of the PIP in question does not include *only* "standard language." That paragraph of the PIP begins with Plaintiff's name. Second, viewing the document as a whole, this paragraph is the *only* part of the of the main body of the PIP after the fill-in-the-blank heading where Plaintiff's name appears.[7] Third and finally, the temporal proximity of Plaintiff's notice of his potentially FMLA-qualifying injury to the issuance of the PIP is sufficient to establish a *prima facie* causal connection. *See Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F. F.3d 1286, 1298 (11th Cir. 2006) ("Close temporal proximity between protected conduct and an adverse employment action is generally 'sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection.'" (citation omitted)). Together these three factors could have discouraged Plaintiff from exercising his right to FMLA-protected leave. Thus, read in context, and making all reasonable inferences in his favor, the undersigned concludes that Plaintiff's claim that the PIP caused his delay in seeking FMLA leave is plausible. *See Diamond*, 677 F. App'x at 592 (holding that discouraging an employee from exercising FMLA-protected rights constitutes interference).

In sum, the undersigned finds Plaintiff's pleadings plausible as to notice and prejudice. Considering the notice and prejudice findings in conjunction with (1) Defendant's failure to provide Plaintiff with adequate or timely notice of his rights under FMLA, (2) the temporal proximity of Plaintiff's notice to Defendant and his being placed on the PIP, and (3) Supervisor's eventual decision to treat the text message as notice, the undersigned also finds Plaintiff's pleadings plausible as to willfulness. Consequently, these findings defeat Defendant's remaining

[7] Contending that, "Plaintiff has misrepresented the PIP's language," Defendant insists that, "the Court must consider the document itself." (Doc. 7 at 12) (citing *Fisher v. Citimortgage, Inc.*, 2013 WL 12106932, at *4 (N.D. Ga. Jan. 29, 2013)).

arguments. Accordingly, the undersigned **RECOMMENDS** that Defendant's motion to dismiss be **DENIED**.

IV. CONCLUSION

For the reasons stated above, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss, (Doc. 7), be **DENIED**.